Positive Vision Labuan Ltd & Ors v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS 25–171–07 OF 2012, 25–172–07 OF 2012 AND 25–173–07 OF 2012
ZALEHA YUSOF J
6 FEBRUARY 2013

Civil Procedure — Judicial review — Appeal against — Appeal against decision of Director of Inland Revenue — Irrevocable election to be charged to tax in accordance with Income Tax Act 1967 — Exemption order exempting from income tax various types of income — Income tax dividends received by offshore company effective from year of assessment 2007 — Whether exemption from income tax under order available to applicants — Whether Director correct in law to disallow tax exemption available under Income Tax (Exemption) (No 22) Order 2007

The applicants were offshore companies and were in the business of investment holding. By virtue of the Labuan Offshore Business Activity Tax (Amendment) Act 2010 ('LOBATA 2010'), the applicants were also known as Labuan companies and entities. The profit of the applicants was subject to tax under the Labuan Business Activity Tax Act 1990 ('LOBATA 1990'). However, vide the Finance Act 2007, a Labuan company might make an irrevocable election in the prescribed form that its profit, if any, was to be charged to tax in accordance with the Income Tax Act 1967 ('Act') in that year of assessment and subsequent years of assessment. On 18 December 2007, the Minister of Finance, vide the exemption order, exempted from income tax various types of income. Among others, the exemption order exempted from income tax dividends received by an offshore company effective from the year of assessment 2007. The applicants received dividends in the year of assessment 2011, which they did not subject to income tax pursuant to the exemption order. In 2011, the applicants made an irrevocable election to be taxed under the Act pursuant to s 3A of the LOBATA 1990. On 16 January 2012, the applicants applied for a decision from the respondent that the exemption from income tax under the exemption order was available to the applicants. The respondent informed the applicants that whilst the exemption was no longer available to the applicants from 12 February 2010. Aggrieved, the applicants filed these applications for judicial review to quash the decision of the respondent. The respondent had raised a preliminary issue that the applications should not be granted as there was a remedy or appeal process available for the applicants under the Act. The primary issue before the court was whether the respondent was correct in law to disallow the tax exemption available under the Income Tax (Exemption) (No 22) Order 2007. As the issue

was an issue of law, the court opined that it would not only be quicker but be better and convenient to all parties involved that it be dealt with under judicial review.

Held:

(1) Since the order was made, the position had now changed with the introduction of s 3A of the LOBATA 2010 and amendment to s 3B of Act. Section 3B of Act makes it clear that companies which have elected to be taxed under Act was not covered by the exemption order, which was also made under the Act. Once election is made, as made by the applicants in this instance, the applicants were no longer eligible for the exemption (see paras 14 & 16).

(2) The letter which contained the decision of the respondent put the cut off date as 12 February 2010. It was a mere letter and no notification on the *gazette* on the cut off date. The letter was dated 20 June 2012 and the election made by the respondents was on 30 May 2011. The letter of 12 February 2010 stated it was a matter of policy. The respondent could not decide on the cut off date by merely basing on policy when the result would be the applicant or other tax payer in their position would be liable to be taxed. Article 96 of the Federal Constitution, provides, inter alia, that no tax shall be levied except by or under the authority of federal law (see paras 17–19).

(3) Without the policy being made, the law was clear that once you have elected, then the exemption order was no more applicable. Therefore, the non-applicable of the exemption order on the applicants must, without any other provision in the law, take effect from the date of the election ie 30 May 2011. Before the date, the applicants were still entitled to get the exemption (see para 20).

(4) The decision of the respondent in the letter dated 20 June 2012 was quashed only to the extent of the fixing of the cut off date. The applicants were liable from 30 May 2010 to be taxed under the Act (see para 21).

[Bahasa Malaysia summary

Pemohon-pemohon adalah syarikat luar pesisir dalam dalam perniagaan pemegangan pelaburan. Mengikut Akta Cukai Aktiviti Perniagaan Luar Pesisir Labuan (Pindaan) ('LOBATA 2010'), pemohon-pemohon juga dikenali sebagai syarikat-syarikat dan entiti-entiti Labuan. Keuntungan pemohon-pemohon adalah tertakluk kepada cukai di bawah Akta Cukai Aktiviti Perniagaan Luar Pesisir Labuan 1990 ('LOBATA 1990'). Walau bagaimanapun, melalui Akta Kewangan 2007, syarikat Labuan mungkin akan membuat pemilihan yang tidak boleh ditarik balik di dalam borang yang ditetapkan bahawa keuntungannya, jika ada, akan dikenakan caj kepada cukai mengikut Akta Cukai Pendapatan 1967 ('Akta') pada tahun taksiran dan

tahun-tahun taksiran kemudiannya. Pada 18 Disember 2007, Menteri Kewangan, melalui perintah pengecualian, dikecualikan daripada cukai pendapatan pelbagai jenis cukai pendapatan. Antara lain, perintah pengecualian tersebut dikecualikan daripada dividen cukai pendapatan yang diterima oleh syarikat luar pesisir berkuat kuasa dari tahun taksiran 2007. Pemohon-pemohon menerima dividen pada tahun taksiran 2011, yang mana mereka tidak tertakluk kepada cukai pendapatan berikutan kepada perintah pengecualian. Pada tahun 2011, pemohon-pemohon membuat pemilihan tidak boleh ditarik balik untuk dikenakan cukai di bawah Akta berikutan s 3A LOBATA 1990. Pada 16 Januari 2012, pemohon-pemohon memohon untuk keputusan daripada responden bahawa pengecualian daripada cukai pendapatan di bawah perintah pengecualian terbuka kepada pemohon-pemohon. Responden memberitahu pemohon-pemohon bahawa pengecualian tidak lagi terbuka kepada pemohon-pemohon dari 12 Februari 2010. Tidak berpuas hati, pemohon-pemohon memfailkan permohonan-permohonan ini untuk semakan kehakiman untuk membatalkan keputusan responden. Responden telah membangkitkan isu permulaan bahawa permohonan-permohonan tidak patut dibenarkan memandangkan terdapat remedi atau proses rayuan untuk pemohon-pemohon di bawah Akta. Isu utama di hadapan mahkamah adalah sama ada responden betul dari segi undang-undang untuk tidak membenarkan pengecualian cukai yang terdapat di bawah Perintah Cukai Pendapatan (Pengecualian) (No 22) 2007. Memandangkan isu adalah isu undang-undang, mahkamah berpendapat bahawa ia bukan sahaja lebih cepat tetapi lebih baik dan mudah kepada semua pihak yang terlibat yang ia akan dikendalikan di bawah semakan kehakiman.

Diputuskan:

(1) Memandangkan perintah telah dibuat, kedudukan sekarang telah berubah dengan pengemukaan s 3A LOBATA 2010 dan pindaan kepada s 3B Akta. Seksyen 3B Akta membuatkan ianya jelas bahawa syarikat-syarikat yang mana telah memilih untuk dikenakan cukai di bawah Akta tidak dilindungi oleh perintah pengecualian, yang juga dibuat di bawah Akta. Apabila saja pemilihan dibuat, seperti yang dibuat oleh pemohon-pemohon di dalam kes ini, pemohon-pemohon tidak lagi layak untuk pengecualian (lihat perenggan 14 & 16).

(2) Surat yang mengandungi keputusan responden meletakkan tarikh akhir sebagai 12 Februari 2010. Ia hanya surat dan bukan pemberitahuan ke atas *warta* atas tarikh akhir. Surat tersebut bertarikh 20 Jun 2012 dan pemilihan yang dibuat oleh responden-responden adalah pada 30 Mei 2011. Surat bertarikh 12 Februari 2010 menyatakan ia adalah perkara polisi. Responden tidak dapat memutuskan pada tarikh akhir dengan hanya berdasarkan atas polisi apabila keputusan adalah pemohon atau pembayar cukai yang lain dalam kedudukan mereka akan bertanggungan

untuk dikenakan cukai. Perkara 96 Perlembagaan Persekutuan, memperuntukkan, antara lain, bahawa cukai tidak akan dilevikan kecuali oleh atau di bawah pihak berkuasa undang-undang persekutuan (lihat perenggan 17–19).

(3) Tanpa polisi dibuat, undang-undang adalah jelas bahawa apabila seseorang dipilih, perintah pengecualian tidak lagi dapat diguna pakai. Oleh itu, ketidakpakaian perintah pengecualian ke atas pemohon-pemohon mesti, tanpa apa-apa peruntukan lain dalam undang-undang, berkuat kuasa dari tarikh pemilihan iaitu 30 Mei 2011. Sebelum tarikh tersebut, pemohon-pemohon masih berhak untuk mendapatkan pengecualian (lihat perenggan 20).

(4) Keputusan responden di dalam surat bertarikh 20 Jun 2012 dibatalkan hanya setakat penetapan tarikh akhir. Pemohon-pemohon bertanggungan dari 30 Mei 2010 untuk dikenakan cukai di bawah Akta (lihat perenggan 21).]

Cases referred to

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119; [1995] 3 CLJ 161, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (folld)

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

Legislation referred to

Federal Constitution art 96
Finance Act 2007
Income Tax Act 1967 s 3B
Income Tax (Exemption) (No 22) Order 2007
Labuan Business Activity Tax Act 1990 s 3A
Labuan Offshore Business Activity Tax (Amendment) Act 2010 s 3A

Palpanaban a/l Deverajoo (Saravana Kumar a/l Segaran with him) for the applicants.
Abu Tariq bin Jamaluddin (Inland Revenue) for the respondent.

Zaleha Yusof J:

[1] The facts as set out in the applicants' written submission are not disputed. The applicants in all these three cases are offshore companies and are in the

business of investment holding. By virtue of the Labuan Offshore Business Activity Tax (Amendment) Act 2010, the applicants are also known as Labuan companies and Labuan entities.

[2] As a general rule, the profit of a Labuan company like the applicants is subject to tax under the Labuan Business Activity Tax Act 1990. However, vide the Finance Act 2007, a Labuan company may make an irrevocable election in the prescribed form that its profit, if any, is to be charged to tax in accordance with the Income Tax Act 1967 ('ITA') in that year of assessment and subsequent years of assessment.

[3] On the 18 December 2007, the Minister of Finance vide the exemption order exempted from income tax various types of income. The essential parts of the exemption order read as follows:

> This Order shall have effect from the year of assessment 2007 and subsequent years.
>
> 'offshore company' has the meaning assigned to it in the Labuan Offshore Business Activity Tax Act 1990
>
> The Minister exempts from tax:-
>
> (a) dividends received by an offshore company

Among others, the exemption order exempted from income tax dividends received by an offshore company effective from the year of assessment 2007.

[4] The applicants received dividends in the year of assessment 2011, which they did not subject to income tax pursuant to the exemption order. The applicants respectively received the following dividends in the year of assessment 2011:

GA Investment Ltd:	RM80,000,000
Avenues Zone Inc	RM49,300,000
Positive Vision Labuan Ltd:	RM147,018,944

[5] In 2011, the applicants had made an irrevocable election to be taxed under the ITA. The irrevocable election was made pursuant to s 3A of the Labuan Business Activity Tax Act 1990 ('LOBATA') on the following dates by the respective applicants:

30 May 2011:	GA Investment Ltd
13 June 2011:	Avenues Zone Inc
15 June 2011:	Positive Vision Labuan Ltd

Consequently, the income of the applicants was subjected to income tax under the ITA.

[6] On 16 January 2012, the applicants through its tax consultant, ie Messrs PricewaterhouseCoopers Taxation Services Sdn Bhd, applied for a decision from the respondent that the exemption from income tax under the exemption order was available to the applicants.

[7] On 20 June 2012, the respondent informed the applicants that whilst the exemption prescribed under the exemption order was available to the applicants as Labuan entities, however, as a matter of policy, the said exemption was no longer available to the applicants from 12 February 2010.

[8] According to the respondent, the implementation of this policy is to provide an equitable tax treatment for companies assessed under the ITA. Further, the respondent alleged that this policy also provides contribution towards the increase of tax for national development.

[9] Being aggrieved by the decision of the respondent, the applicants had filed these applications for judicial review to quash the decision of the respondent that the applicants do not qualify for exemption from income tax under the Income Tax (Exemption) Order (No 22) 2007 from 12 February 2010.

PRELIMINARY ISSUE

[10] The respondent had raised a preliminary issue that the applications should not be granted as there is a remedy or appeal process available for the applicants under the ITA. The respondent had cited among others the case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 which was followed by *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235; and also *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119; [1995] 3 CLJ 161 to support their argument.

[11] However I agree with the applicants and applied the principles enunciated by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65 which, inter alia, held that the availability of appeal does not debar the court from quashing an order by certiorari and that everything depends upon the facts of the case. It further said if a complaint raises a question of law which could be dealt with by appeal or by judicial review, the latter may be preferable on the ground that judicial review may be quicker than the appeal procedure.

[12] In this instance, there is no dispute as to the facts, and the only issue involved here is whether the respondent was correct in law to disallow the tax exemption available under the Income Tax (Exemption) (No 22) Order 2007.

As the only issue is no doubt an issue of law, I am of the opinion it would not only be quicker but be better and convenient to all parties involved that it be dealt with under judicial review.

DECISION ON SUBSTANTIVE APPLICATION

[13] I have perused the cause papers and submissions made by the parties. It is not disputed that the said exemption order was made under the ITA on 18 December 2007.

[14] However, since the order was made, the position has now changed with the introduction of s 3A in LOBATA and amendment to s 3B of the ITA. The new s 3A of the LOBATA allows offshore companies like the applicants, to make election to be taxed under the ITA. It read as follows:

> (1) Notwithstanding any other provision of this Act, an offshore company carrying on an offshore business activity may make an irrevocable election in the prescribed form that any profit of the offshore company for any basis period for a year of assessment and subsequent basis period to be charged to tax in accordance with the Income Tax Act 1967 in respect of that offshore business activity.
>
> (2) The election referred to it subsection (1) shall be made and furnished to the Director General three months after the beginning of the basis period for a year of assessment:
>
> Provided that for the basis period ending on a day in the year of assessment 2008, the election under this section may be made and furnished before 1 August 2008.

[15] The new s 3B of the ITA provides as follows:

> Notwithstanding section 3, tax shall not be charged under this Act on income in respect of an offshore business activity carried on by an offshore company other than an offshore company (in this Act referred to as 'chargeable offshore company'), which has made an election under section 3A of the Labuan Offshore Business Activity Act 1990.

[16] Section 3B of the ITA, to me, makes it clear that companies which have elected to be taxed under ITA is not covered by the exemption order, which again I must stress, was also made under the ITA. It is therefore my opinion, that once election is made, as made by the applicants in this instance, the applicants are no longer eligible for the exemption.

[17] The letter which contained the decision of the respondent put the cut off date as 12 February 2010. I note, it is a mere letter and no notification on the *gazette* on the cut off date. The letter was dated 20 June 2012 and the election made by the respondents was on 30 May 2011.

[18] The letter of 12 February 2010 states it was a matter of policy. Question — can the respondent decide on the cut off date by merely basing on policy when the result would be the applicant or other tax payer in their position would be liable to be taxed? In this respect I think we must go back to the highest law of the country ie the Federal Constitution.

[19] Article 96 of the Federal Constitution, provides, inter alia, that no tax shall be levied except by or under the authority of federal law. Hence I do not think that the respondent can simply fix the cut off date which results in the applicants now being subject to tax, without at least make it an order in the *gazette*.

[20] But at the same time, without the policy being made, the law is clear that once you have elected, then the exemption order is no more applicable. Therefore, I am of the opinion that the non-applicable of the exemption order on the applicants must, without any other provision in the law, take effect from the date of the election ie 30 May 2011. Before the date, the applicants were still entitled to get the exemption.

[21] Consequently, I order the decision of the respondent in the letter dated 20 June 2012 is quashed only to the extent of the fixing of the cut off date. The applicants I feel are now liable from 30 May 2010 to be taxed under the ITA. I make no order as to cost.

Order accordingly.

Reported by Afiq Mohamad Noor